Cat. Nos. 352, 353.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

Petitioners submit for the consideration of this learned Court their reply to the brief of the Government, and further in support of the petition for a Writ of Certiorari directed to the Circuit Court of Appeals, for the Second Circuit, in the above entitled matter.

Counsel will not burden the Court with a repetition of what has already been fully treated in the main brief, and will limit themselves to a discussion only of such new matter as is presented by the brief in opposition to the petition.

For the sake of clarity, all references will be to the United States Code, Title 21.

The Facts.

The brief in opposition reveals a misapprehension by the respondent, with respect to the facts. For example,

it would appear from a reading of the last paragraph on page 6, and its continuation on page 7, of the brief in opposition, that the District Court made a finding of fact. An analysis of the record negates this conclusion beyond the possibility of refutation. The Government's observations are apparently based upon folios 132 to 134 inclusive (pp. 44 and 45) of the Record.

The Government has interpreted folio 132 to indicate that the Court concluded that the goods in question were never intended for export. That this conclusion is unjustified is obvious from a reading of that portion of the Record. It clearly appears that Mr. Judge Kennedy was not stating a conclusion of his own, but was merely summarizing the contentions raised by the affidavits submitted in support of the motion. It is unfortunate that Judge Kennedy chose to express himself in the ambiguous language which he employed. In spite of that ambiguity, however, there is no justification for the statement that the Record includes a finding of fact in agreement with the Government's contentions; and such statement is inaccurate. It should be remembered that these contentions of the Government were traversed by the petitioners in this Court (see affidavit of Samuel Swoff, Record, pp. 39 to 43).

A consideration of folio 134 (Record, p. 45) shows clearly that Judge Kennedy did not deem it of importance, in the decision of the case, to pass upon the disputed question of fact. He said:

> "Assuming, and even finding as a fact, that the claimants did not intend to export the goods, but planned to dispose of them in the domestic market, I still adhere to my original determination."

The Record unquestionably indicates that Judge Kennedy did not deem it of importance to the decision of the matter to make a specific finding of fact for the reason that such

a finding of fact was not necessary for the determination of the question presented to him, *i. e.*, the question of the Court's power to permit that condemned goods be exported in compliance with Section 381.

The Government makes the further contention that the failure to consign the goods to a particular foreign purchaser indicates that the goods were not intended for export. Such an assumption is not justified by the facts and indicates a total disregard of the customary practice prevailing in the export trade.

It is customary to ship goods intended for export to a trade center where dealers and brokers congregate and meet. At that point, *i. e.*, the trade center, the goods are consigned to their final destination, to the purchaser procured by a broker. It is not uncommon when goods leave the owner's possession, that the owner does not know to whom they will ultimately be sold for export. To act otherwise would make it impossible for goods to be sold for export. This impossibility would be based upon the fact that the prospective customer could not go to a central place to examine the goods, and a centrally located market could not exist. The exigencies of the export business demand that goods for export be shipped to a specific market for sale and trans-shipment to a foreign customer. It is obvious, therefore, that the failure of the owner of merchandise to consign them to a particular foreign purchaser does not, as contended by the Government, indicate an unlawful intention to divert such goods to the domestic market. It should also be noted that the Government released these goods from their original source—the manufacturer.

The Law.

The Court's attention is, at this time, respectfully directed to the omission from the brief in opposition of any

reference to pertinent authority on the question of the power of the Court to permit export of merchandise which has been condemned, where such export is not prohibited by the statute. The Government concedes by such omission, that this question is of first impression.

The argument that the statute permits, under certain circumstances, that condemned goods may be released for sale in this country, but that under no circumstances can condemned goods be released for export, cannot be characterized otherwise than as circumlocution.

Section 334 permits that goods may be released to be brought into compliance with the provisions of the Chapter. Goods may be brought into compliance with the provisions of the Chapter when they may validly be sold as unadulterated. Section 342 defines adulterated goods with respect to domestic commerce. Section 381 defines adulterated goods with respect to foreign commerce. If, in either case, the goods conform to the applicable definition, they are sold in compliance with the Act. To hold otherwise is a strained construction.

The Government argues further, on page 11 of its brief, that great significance must be given to the fact that the statutes under consideration are contained in different titles. An examination of this argument discloses its vicarious and unsubstantial nature. The Government argues that because the provision with respect to export and the provision with respect to condemnation are contained in separate titles or sub-titles, it follows that export of condemned goods is not permitted. This argument is entirely baseless.

Section 381, relating to exports, is contained in subchapter 8 of the Act. That sub-chapter is complete without reference to any other portion of the Act. That subchapter relates to exports and imports, and no other subject.

Section 342 is contained in sub-chapter 4 of the Act. That relates solely and entirely to food generally, and is complete within itself and has no relation to any other sub-chapter.

Section 334, which relates to prohibited acts and penalties is contained in sub-chapter 3, and is complete in itself. We see, therefore, from the fact that there are separate sub-chapters devoted to each topic, that it was the manifest intent of Congress to provide certain standards with respect to foreign goods (sub-chapter 8), and different standards with respect to domestic goods (sub-chapter 4). Since sub-chapter 3, containing the regulatory provisions, does not differentiate between domestic and foreign goods, it is manifest that it was the intention of Congress that these provisions should have general application only.

Adopting that construction, the statute becomes a wise and logical enactment. In the light of that construction then, it must be held that Congress intended that a Judge of the District Court should have the power to permit the sale of goods if, in the event of such sale, the goods conformed to some statutory definition of "unadulterated". If the goods could be treated in such a manner that they conformed to the high standard for domestic goods, they could be released for domestic sale. If the goods, in spite of treatment, could not be made to conform to the standard for domestic goods, but did meet or could be made to conform to the standard for foreign goods, they would, therefore, be sold if released, in compliance with the Act, and the Court had power to direct such release.

The contention urged by the Government on page 13 of its brief to the effect that there is danger of fraudulent diversion of merchandise if the Court be granted such power, falls of its own weight. There is no greater possibility of diversion with respect to foreign goods than there is with respect to goods for domestic trade. Con-

gress recognized and provided against the possibility of diversion by the requirement that proper bond should be filed and that the disposition of the goods should be under the supervision of the Federal Security Agency. Does the Government seriously urge that in spite of the vigilance of the Federal Security Agency, there is no safeguard against diversion? To pose the question is to furnish the answer.

It is therefore respectfully submitted that Congress has vested the District Court with power to permit the sale of condemned goods in the export trade, and that that power was properly exercised by the District Court. It is respectfully submitted that the Circuit Court was in error when it refused to recognize the existence of such power in the District Court.

One point remains for consideration and that is the matter of the timeliness of the appeal. Counsel will not burden the Court with an extended discussion of this matter for the reason that this was fully considered in the main brief.

The cases cited in the government's brief with respect to the rule of law applicable to the timeliness of the appeal are clearly distinguishable from the case at bar. All of the cases cited in the government's brief were cases in which the second application had been made pursuant to some rule of Court. For example, they were either made in bankruptcy proceedings in which a special rule applies or pursuant to some rule of Court permitting an application for re-hearing. The government has referred to Rule 59b of the Federal Rules of Procedure in support of its contention that the second application extended the time to appeal. If this second application in the case at bar had been an application for a new trial, the government would be correct in its contention but the second application made in this case was not an application for a new

trial and is therefore not governed by the provisions of Rule 59b.

The question is not of first impression. In the case of *Zadig* v. *Aetna*, 42 Federal, Second Series, 142, the Court pointed out the difference between a second application made pursuant either to a statute or a rule and a second application made for a re-hearing on a previous application, where there is no rule or statute permitting such second application. The Court ruled in that case that where the statute or rule provides that a second application may be made, the time to appeal is measured from the order on the second application and where there is no such authority for a second application, the making of the second application does not extend the time to appeal.

It is therefore respectfully submitted that the cases cited on page 8 of the government's brief had no relevancy to the case at bar and that the appeal in this case taken from the District Court to the Circuit Court of Appeals was not timely taken. The Circuit Court of Appeals was in error when it declined to dismiss the appeal.

A Writ of Certiorari should issue to the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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